NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

TRAYVONNE ADAMS,

Defendant and Appellant.

B282045

(Los Angeles County Super. Ct. No. BA450605)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard S. Kemalyan, Judge. Affirmed and remanded with instructions.

Susan Morrow Maxwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Trayvonne Adams for possessing a firearm as a felon (Pen. Code, § 29800, subd. (a)(1))¹ and possessing an assault rifle (§ 30605, subd. (a)). The jury also found true the allegations that Adams committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)). Adams admitted he had a prior conviction for a felony that was a serious felony within the meaning of section 667, subdivision (a)(1), and a serious or violent felony within the meaning of the three strikes law. (§§ 667, subds. (b)-(i), 1170.12.) The court sentenced Adams to a prison term of 12 years, which included a five-year enhancement under section 667, subdivision (a)(1).

Adams argues that substantial evidence does not support his convictions and the true findings on the gang allegations and that the trial court erred by admitting certain photographs into evidence. Because none of Adams's arguments has merit, we affirm the convictions. We remand, however, for the trial court to exercise its discretion whether to strike the five-year sentence enhancement under section 667, subdivision (a)(1).

FACTUAL AND PROCEDURAL BACKGROUND

A. Adams Posts Pictures of Himself on Facebook Holding a Rifle, and the Police Arrest Him

On March 14, 2016 someone shot and killed a man believed to be a member of the Rollin' 30s Harlem Crips in retaliation for

¹ Undesignated statutory references are to the Penal Code.

the shooting several hours earlier of a member of the rival Rollin' 20s Neighborhood Bloods. Police recovered numerous 7.62 millimeter casings from the scene, indicating that the gun used to shoot the member of the Rollin' 30s Crips was most likely an AK47 assault rifle.

A week later, Adams, who was a member of the Rollin' 20s Bloods, exchanged hostile messages on Facebook with a user called "Nina Bkang." "Bkang" is commonly used by members of the Rollin' 30s Crips to signify they are "Blood killers." One of Adams's messages said, "I got choppers on BLOODS. And its DIRTY. Yo homies on it. On 20's." Adams also sent Nina Bkang two photographs showing Adams holding what appeared to be an AK47 assault rifle. "Choppers" is a street term used to refer to AK47 assault rifles. "Dirty" describes a weapon that has been used to commit a crime, and "on Bloods" is an oath of truth from a member of the Rollin' 20s Bloods.

In September 2016 Los Angeles Police Department officers arrested Adams in connection with the March 14, 2016 murder of the man suspected to be a member of the Rollin' 30s Crips. Adams initially told detectives the gun shown in the Facebook posts was "fake" and a "water gun," but he eventually admitted it was an AK47. He said he "wanted to use it myself, but I couldn't find the courage to do it." When asked what he wanted to use it for, Adams said, "To do the devil's work. I – I wanted to prove myself. But every time I got this close to going to do something about it . . . something in my ear told me, nah, don't do it." Adams said he bought the gun for \$1,000 but had it only a few weeks before his roommate stole it. He said, "And then it just got to the point where I think maybe, well, I was coming to the conclusion where I was gonna try to do something stupid, and it

came up missing." Adams did not know his roommate's full name, but said his first name was Darryl. Adams said he had not seen Darryl or the gun since March 2016.

The People charged two other members of the Rollin' 20s Bloods with murder and charged Adams with possession of a firearm by a felon and possession of an assault rifle. The People alleged Adams committed both offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members. The People also alleged Adams suffered a prior serious or violent felony conviction within the meaning of the three strikes law and section 667, subdivision (a)(1).

B. The Jury Convicts Adams, and the Trial Court Sentences Him

Adams's first trial ended in a mistrial because the jury could not reach a verdict. At the beginning of his second trial, counsel for Adams objected to the admission of two photographs the People obtained from the Instagram account of another member of the Rollin' 20s Bloods, Derek "Mack" Daniel. While in jail awaiting trial, Adams told another fellow gang member, Christopher Griffiths, that Daniel had the "stolen" AK47. Police obtained records of Daniel's Instagram account that included a photograph Daniel posted on March 5, 2016 showing him holding a rifle and a pistol. Another photograph posted on March 1, 2016 showed Daniel with two other men, one of whom was holding a rifle. The People intended to introduce testimony from a firearms expert that the gun appearing in Daniel's photographs appeared to be the same type of modified AK47 as the gun appearing in the photographs Adams posted on Facebook. Counsel for Adams

objected to Daniel's photographs on the grounds they were too prejudicial and lacked foundation to tie Adams to the gun depicted in the photographs. The trial court overruled Adams's objections and admitted the Instagram photographs at trial.

During trial the People's firearms expert, Detective James Yoshida, testified the rifle depicted in Adams's and Daniel's photographs was a modified AK47 known as a MAK-90 (or "modernized AK" rifle). He compared the photographs and explained the rifles had the same modifications, including their "M4-style buttstock, the foregrip that is clearly a modified version of a forestock as opposed to the common wood stock that is affixed to the foregrip of the AK47 rifle, . . . and the magazine that's attached to the firearm." Detective Yoshida said a firearm owner can make these modifications, but manufacturers also sell a small number of firearms with the same modifications.

Detective Yoshida said there were two types of replica AK47 rifles, one used in the entertainment industry and the other sold to hobbyists called an "airsoft" gun.² Both types of replicas can cost as much as \$1,000. Detective Yoshida stated that, in 26 years as a police officer, he had never found a replica

[&]quot;An 'airsoft' gun is a toy weapon that uses air to propel plastic pellets at a nonlethal velocity. These weapons can nevertheless inflict pain and injury, and often closely resemble bona fide firearms." (Equinox Holdings, Inc. v. National Labor Relations Board (D.C. Cir. 2018) 883 F.3d 935, 937, fn. 1.) Federal and California laws regulate the manufacture of airsoft guns and require them to include "blaze orange" parts to distinguish them from real firearms. (See 15 U.S.C. § 5001, subd. (b)(1); § 16700, subd. (b)(4)(B).)

rifle in the course of an investigation. He had also never seen a water gun that looked like the firearm shown in Adams's and Daniel's social media accounts. The People's gang expert, Officer John Thompson, also testified that AK47s are rare and that he had never before found an AK47 or a replica AK47 in the course of an investigation.

In connection with the allegation Adams committed the offenses to benefit a criminal street gang, Adams stipulated the Rollin' 20s Bloods was a criminal street gang within the meaning of section 186.22. To show how possession of a firearm would benefit the Rollin' 20s Bloods, Officer Thompson testified firearms give gang members "power" and allow them "to instill fear into . . . rival gang members [and] the community." The prosecutor gave Officer Thompson the following hypothetical: "An older Rollin' 20s gang member is on social media. He's having a series of messages with a rival Rollin' 30s gang member or someone he believes to be a rival Rollin' 30s gang member. During the course of that exchange on social media, the Rollin' 20s gang member is posting a selfie or a photograph of himself holding what appears to be an AK47 rifle. He tells the rival gang member that he has a chopper with his dead homies body on there." Based on this hypothetical Officer Thompson testified possession of the firearm would benefit the Rollin' 20s Bloods criminal street gang. He said the possession of an AK47 would give a criminal street gang an "added level of power" because AK47s are uncommon, and an individual gang member would benefit from possessing an AK47 because it would increase his status.

The jury convicted Adams of both charges and found true the gang allegations in connection with both counts. Adams admitted the prior felony conviction allegations. The court sentenced Adams on his conviction for possession of a firearm by a felon to the middle term of two years, doubled to four years under the three strikes law, plus the middle term of three years on the gang enhancement and five years for the prior serious felony conviction, for a total of 12 years. The court stated it was "required as to a violation of [section] 667(a)(1) to order an additional consecutive term of five years." The court imposed and stayed a similar 12-year term on Adams's conviction for possession of an assault rifle. Adams timely appealed.

DISCUSSION

- A. Substantial Evidence Supports Adams's Convictions for Unlawful Firearm Possession
- Section 29800, subdivision (a)(1), prohibits a person who has been convicted of a felony from possessing a firearm. ""A defendant possesses a weapon when it is under his dominion and control. . . . Implicitly, the crime is committed the instant the felon in any way has a firearm within his control."" (*People v. Frutoz* (2017) 8 Cal.App.5th 171, 176.) Section 16520 defines "firearm" to mean "a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion." Possession of a toy gun does not violate section 29800. (See *People v. Law* (2011) 195

Cal.App.4th 976, 983 ["toy guns obviously do not qualify as a "firearm," nor do pellet guns or BB guns because, instead of explosion or other combustion, they use the force of air pressure, gas pressure, or spring action to expel a projectile"]; *People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435 [same].) The People can establish an object was a "firearm" by direct or circumstantial evidence. (*Monjaras*, at p. 1435.)

Section 30605 prohibits anyone from possessing an "assault weapon." Section 30510 defines "assault weapon" as one of the "designated semiautomatic firearms" listed in the statute, one of which is an AK47 rifle. (See § 30510, subd. (a)(1)(A).) Possessing an assault weapon is a crime if the defendant knows or should have known the weapon he or she possessed was an assault weapon. (*People v. Valenzuela* (2001) 92 Cal.App.4th 768, 779; see *In re Daniel G.* (2004) 120 Cal.App.4th 824, 831.)

"To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts

upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support" the jury's verdict." (*People v. Penunuri* (2018) 5 Cal.5th 126, 142.)

""The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ""Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ""If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."""" [Citation.] When 'there are two possible grounds for the jury's verdict, one unreasonable and the other reasonable, we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable ground." (People v. Ghobrial (2018) 5 Cal.5th 250, 277-278; accord, People v. Jones (2018) 26 Cal.App.5th 420, 442.)

> 2. Substantial Evidence Supports the Jury's Finding That the Gun in Adams's Facebook Photographs Was a Firearm

Adams contends substantial evidence does not support his convictions under sections 29800 and 30510 because the People

did not prove the gun in Adams's Facebook posts was "capable of shooting" and, therefore, a real gun. Adams suggests the People could have shown the gun was real only by proving the gun pictured with him was the gun used in the retaliatory murder of the Rollin' 30s Crips gang member on March 14, 2016. Adams overstates the People's burden.

As stated, to convict Adams of unlawfully possessing a firearm under section 29800, the People had to show the firearm Adams held in the photographs he posted on Facebook was "a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion." (§ 16520.) The trial court instructed the jury without objection that a "firearm does not need to be in working order if it was designed to shoot and appears capable of shooting." Because the definition of "assault weapon" under section 30510 incorporates the term "firearm," we assume for purposes of this case that the People must also show the firearm pictured with Adams was "designed to shoot," and not a toy, to convict Adams under section 30605.

Much of the evidence the firearm in Adams's Facebook postings was "designed to shoot" came from Adams. In his interview with police officers, Adams initially said the firearm was a "water gun" and a "fake," but then admitted the gun was a real AK47 that he intended, until his roommate stole it from him, to use "to do the devil's work." When asked how long he had "the AK47," Adams replied, "Not too long. . . . I had just got it." Adams also said the gun came with two clips "fully loaded" of "Mac 90 cartridges." He never claimed the ammunition was fake. When a detective asked Adams, "Is the gun we're talking about the gun you have in those photos? The ones you put on

Facebook?" Adams replied, "Yes." Although Adams originally claimed the firearm was fake, the jury was entitled to discredit this statement and credit Adams's other statements about the gun, all of which supported the conclusion Adams purchased and intended to use the gun to shoot live ammunition, not water. (See *People v. Jones* (2010) 186 Cal.App.4th 216, 248, fn. 4 ["[s]ubstantial evidence may be found in 'only part of a witness's testimony"]; *In re Daniel G.*, *supra*, 120 Cal.App.4th at p. 830 ["the trier of fact may believe and accept as true only part of a witness's testimony and disregard the rest," and "[o]n appeal, we must accept that part of the testimony which supports the judgment"].)

In addition, Adams's statements in his Facebook postings that he had "choppers" and that the gun was "dirty" were circumstantial evidence the firearm was real. Officer Thompson explained that referring to a firearm as "dirty" meant that "a crime has been committed on it, whether it's shootings or murders," and that gang members "brag" about having "dirty" weapons to rival gang members. (See *People v. Monjaras*, supra, 164 Cal.App.4th at p. 1437 ["defendant's conduct and words in using [a firearm] constitute sufficient circumstantial evidence to support a finding that it was a firearm within the meaning of section 12022.53, subdivision (b)"].)³ Thus, "[w]hile it is conceivable that the [gun] was a toy, the jury was entitled to

³ Section 12022.53 provides a sentence enhancement for persons convicted of enumerated felonies who use a firearm in committing the crime. Section 12022.53 adopts the definition of firearm in section 16520. (See § 12001.)

take defendant at his word, so to speak, and infer from his conduct that the [gun] was . . . real." (*Monjaras*, at p. 1433.)

The Instagram photos posted on Daniel's account provide further circumstantial, albeit not as strong, evidence the gun pictured with Adams was a real AK47. Police recorded a conversation in which Adams told Griffiths that Daniel had the stolen AK47, thus placing the gun pictured with Adams in Daniel's possession. Considering the scarcity of AK47s, the fact that both Adams and Daniel posted pictures of themselves with an AK47 within weeks of each other, and Adams's connection to Daniel, a reasonable juror could conclude the AK47 in Daniel's photographs was the same AK47 as the one in Adams's photographs. As the prosecutor argued at trial, the Instagram photographs lent "legitimacy to the firearm." And in his closing argument, the prosecutor used the Instagram photographs to rebut Adams's defense that the weapon was fake by arguing "[a]nother member of a violent street gang" would not present pictures of himself on Instagram holding a "fake gun."

B. The Trial Court Did Not Abuse Its Discretion in Admitting the Instagram Photographs

Adams argues the court erred in admitting Daniel's Instagram photographs because the photographs were "highly inflammatory and prejudicial." He contends the photographs

12

Adams also argues the Instagram photographs "were cumulative on the issue regarding the gang allegations." His failure to make this objection at trial, however, forfeited the argument on appeal. (See *People v. Parker* (2017) 2 Cal.5th 1184, 1227 [appellant forfeited the argument that evidence was

"only served to muddy the waters and confuse the jury." He also argues the trial court should have excluded the photographs because Adams did not post or appear in them.

A court has discretion to exclude relevant evidence under Evidence Code section 352 "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice." (*People v. Jackson* (2016) 1 Cal.5th 269, 330; see *People v. Anderson* (2018) 5 Cal.5th 372, 402 ["[t]he trial court has broad discretion both in determining the relevance of evidence and in assessing whether its prejudicial effect outweighs its probative value"].) "A trial court's exercise of discretion under section 352 will be upheld on appeal unless the court abused its discretion, that is, unless it exercised its discretion in an arbitrary, capricious, or patently absurd manner." (*People v. Suff* (2014) 58 Cal.4th 1013, 1066; see *People v. Thomas* (2012) 53 Cal.4th 771, 806.)

"[U]ndue prejudice is that which "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues."" (*People v. Jones* (2012) 54 Cal.4th 1, 61.) "Evidence is not "unduly prejudicial" under the Evidence Code merely because it strongly implicates a defendant and casts him or her in a bad light, or

cumulative by failing to object during the relevant testimony]; *People v. Leon* (2010) 181 Cal.App.4th 452, 460 [appellant forfeited the argument on appeal that evidence was irrelevant because he objected at trial only on the basis of undue prejudice].) In any event, because the Instagram photographs were relevant both to the charged offenses and to the gang allegations, they were not merely cumulative of other evidence admitted with respect to the gang allegations.

merely because the defendant contests that evidence and points to allegedly contrary evidence." (*Id.* at pp. 61-62.) ""Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient." (*People v. Doolin* (2009) 45 Cal.4th 390, 438-439; accord, *People v. Henriquez* (2017) 4 Cal.5th 1, 28.)

To be sure, "the introduction of gang-related evidence presents a danger of undue prejudice." (People v. Pettie (2017) 16 Cal.App.5th 23, 44.) "Some gang evidence relating to defendants 'may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (Ibid.) But that is not the case here. As explained, the Instagram photographs were probative of Adams's guilt because they tended to prove the AK47 was real. The photographs also were probative on the issue of Adams's motive to possess the firearm (i.e., to intimidate rival gang members) and to prove the gang allegations. (Cf. People v. Hernandez (2004) 33 Cal.4th 1040, 1049-1050 [where evidence of gang affiliation tends to prove motive or other elements of a charged offense, "any inference of prejudice [from trying the charges together with a gang enhancement] would be dispelled"]; Pettie, at p. 43 [same].)

The trial court did not abuse its discretion in ruling the Instagram photographs were not unduly prejudicial. The photographs were relevant to Adams's guilt and, as the prosecutor argued at trial, other admitted evidence arguably cast Adams in an even worse light than the Instagram photographs,

in which he did not even appear.⁵ In particular, Adams's Facebook posts included the following statements to a rival gang member: (1) "On BLOODS YOU don't want this my nigga. I trained these lil niggas to kill and I show them how its done. My lil niggas is itching"; (2) "I hate killing lil kids"; (3) "I got choppers on BLOODS. And its DIRTY. Yo homies on it." As stated, Officer Thompson testified that the last phrase meant Adams was claiming to have an AK47 used to shoot a member of the Rollin' 30s Crips. In light of this evidence, the Instagram photographs were unlikely to provoke additional emotional bias from the jury. The trial court did not abuse its discretion in concluding the probative value of the Instagram photographs outweighed any probability that their admission created a substantial danger of undue prejudice.⁶

Adams contends his absence from the Instagram photographs is reason to exclude them, but the People demonstrated a sufficient connection between Daniel and Adams and their respective social media accounts for the court to admit the photographs. In addition to Adams's statement that Daniel had Adams's allegedly stolen AK47, the social media accounts of both Adams and Daniel included references to the March 2016 murder of a fellow gang member and photographs with the individuals ultimately charged with the retaliatory murder.

Adams also contends the trial court's failure to give a limiting instruction concerning the Instagram photographs, after agreeing to do so at trial, "compound[ed] the prejudice." The instruction the court agreed to give, however, concerned references to the retaliatory murder of a rival gang member, not the Instagram photographs.

C. Substantial Evidence Supported the True Findings on the Gang Allegations

Adams argues substantial evidence did not support the jury's true findings on the gang allegations because the hypothetical posed to Officer Thompson was not based on the evidence at trial. (See *People v. Franklin* (2016) 248 Cal.App.4th 938, 949 ["[w]hile an expert may render an opinion assuming the truth of facts set forth in a hypothetical question, the 'hypothetical question must be rooted in facts shown by the evidence'"].) In particular, Adams contends "[n]o evidence was presented at trial that [Adams] posted the photograph of himself holding the AK47—assuming *arguendo* it was an AK47—during the back and forth messaging with rival gang member Nina Bkang."

But there was. The Facebook records included Adams's correspondence with several people, including "Nina Bkang." Adams asserts "[t]he messaging ends" without corroboration that Adams sent the photographs of himself holding a firearm to Nina Bkang. The exchange of messages between Adams and Nina Bkang, however, continues after Adams asserts it ends, and it includes both of the photographs depicting Adams holding what the jury concluded was an assault rifle. Each entry in the Facebook records includes fields for "Recipients," "Author," "Sent [date and time]," "IP [address from which the post originated]," "Body [of the message]," and "Attachments" (if any). An entry dated March 22, 2016 from Trayvonne Adams to Nina Bkang at

17:05:06 UTC⁷ shows an attached image of Adams taking a picture of himself with his cell phone while holding an AK47. Another entry dated March 22, 2016 from Trayvonne Adams to Nina Bkang at 17:05:11 UTC shows an attached image of Adams holding a type of AK47. Thus, there was evidence to support Officer Thompson's hypothetical, which as stated included the fact that a "Rollin' 20s gang member [posted] a selfie or a photograph of himself holding what appears to be an AK47 rifle" in "a series of messages with a rival Rollin' 30s gang member or someone he believes to be a rival Rollin' 30s gang member." Officer Thompson's testimony was not "based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors."" (People v. Franklin, supra, 248 Cal.App.4th at p. 949.)

D. A Limited Remand Is Appropriate for the Court To Consider Whether To Strike the Enhancement Under Section 667, Subdivision (a)

When the trial court sentenced Adams, section 667, subdivision (a), prohibited the court from striking the five-year enhancement under that statute. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The Legislature, however, has amended sections 667 and 1385, effective January 1, 2019, to give trial courts discretion to dismiss, in the interest of justice, a five-year

⁷ The People's social media expert explained that UTC stands for Universal Time Coordinated, which "is the [international] standard measurement of time."

sentence enhancement under section 667, subdivision (a). (See Cal. Const., art. IV, § 8, subd. (c)(1); *Garcia*, at p. 973.)

Adams argues, the People concede, and we agree the new provisions apply to defendants, like Adams, whose appeals are not final on the law's effective date. (See *People v. Conley* (2016) 63 Cal.4th 646, 656; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Garcia*, *supra*, 28 Cal.App.5th at p. 973.) Adams also argues, the People concede, and we agree that, in the words of the People's supplemental brief on this issue, "remand to the trial court for reconsideration of whether to dismiss [Adams's] five-year prior serious felony conviction is appropriate."

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to allow the trial court to exercise its discretion whether to strike the five-year enhancement under sections 667, subdivision (a), and 1385.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.